IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

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Case No. 156

Date of filing 26 May 1983

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✓ CONCURRING OPINION of Judge Aldrich

Date 26 May 1983 14 pages in English. — pages in Farsi.

_____ DISSENTING OPINION of _____

Date _____ _____pages in English. _____pages in Farsi.

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Date _____ _____pages in English. _____pages in Farsi.

CASE NO. 156
CHAMBER TWO

AWARD NO.47-156-2

ITT INDUSTRIES; INC.

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

Concurring Opinion of George H. Aldrich

Settlements are always to be encouraged and are difficult to resist, so I join in incorporating the settlement in this case into an award on agreed terms. Nevertheless, I cannot in good conscience refrain from setting forth my views on the international law questions of expropriation raised by the claim. I do not believe that the settlement should deprive the parties or the public of these views on important questions of international law, particularly as I believe the settlement may well have been inspired, at least in part, by the Respondent's desire to prevent these views from appearing in the Award.

1. The Facts

The facts relevant to the expropriation claim are the following:

The Claimant, a Delaware corporation, is the 100 percent owner of ITT Svenska, a Swedish corporation which, in turn, is the 100 percent owner of another Swedish corporation, IKO, Sweden. The Claimant acquired ownership of IKO Sweden in 1968. At the time the claims involved in this case arose, that is in December 1980, IKO Sweden owned 25 percent of the stock in IKO Iran, an Iranian public joint stock company. IKO Sweden had earlier owned 40 percent of IKO Iran, but its share had been reduced to 25 percent in two increments in 1976 and 1978 through laws requiring the sale of shares to the Government and the public.

On 22 December 1980 the Respondent Government appointed four members of the Board of Directors of IKO Iran and shortly thereafter the fifth member of the five-member board, thus ousting the directors elected by the shareholders, including the one director selected by IKO Sweden. This action was taken under the Act for the Protection and Development of Iranian Industries, approved by the Revolutionary Council on 7 July 1979, evidently under Article 1, section (c) of the Act relating to companies with extensive loans.

2. Taking of Property

The Respondent assumed control of IKO Iran on 22 December 1980 when it replaced the Board of Directors selected by the stockholders with directors of its own choosing. This action was taken pursuant to the "Legal Bill Concerning the Appointment of Provisional Director or Directors for Supervising Production, Industrial, Commercial, Agricultural and Service Units Whether in Public or Private Sector" of 14 June 1979 and the "Protection and Development of Iranian Industries Act" of 7 July 1979. It is noteworthy that Article 2 of the Bill provides that, upon appointment of directors, "... the earlier directors and persons in charge will be stripped of their competence..." and that "[s]hareholders are not allowed in any way to appoint directors in their stead." Article 3, which defines the management powers of the government-appointed directors, states: "The carrying out of affairs beyond the normal and current affairs of the unit shall be contingent upon the approval of the relevant ministry, government institution or company." Article 5 requires the submission of reports by the directors to the relevant ministries, and its maintenance-of-employment purpose is succinctly expressed in Article 6 as follows: "During the period in which the units mentioned in Article 1 are subject to the provisions of the law, no legal action whatsoever is allowed that causes lockout or stoppage of its work."

The Claimant argues that this assumption of control by the Government constituted a taking of its property, under international law, that is, a taking of its 25 percent equity interest in IKO Iran and that it is entitled to prompt, adequate and effective compensation for such taking. The Respondent denies that the assumption of control, which may be only temporary, constitutes a taking of property or gives rise to any obligation to compensate. In this connection, at the Hearing the Respondent submitted a Supplemental Decree to the Act for the Protection and Development of Iranian Industries issued by the Revolutionary Council in April 1980 which indicates that a five-member committee[1] will be responsible for determining the ownership status of companies placed under the management or supervision of the Government under category C of Article 1 of the Act. The Decree also provides:[2]

> In the event that the concern, upon the issuance of a final ruling, is put at the disposal of its shareholders, the shareholders shall have no claims whatsoever in connection with the profit and loss of the period of the Government intervention in the operation of the concern.

It seems clear that IKO Sweden has been totally deprived of its rights to participate in the management of IKO Iran and to receive information on the financial affairs of the

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[1] The Committee is to be composed of representatives of the Office of the Prosecutor General, of the organization managing the concern, of the Islamic Consultative Assembly and of the President, as well as a religious judge. See Article 2 of the Decree.

[2] Article 2, Note 2.

company from 22 December 1980 until the present. No evidence was presented as to whether the company has, in fact, been managed since 22 December 1980 in the interest of the shareholders or for broader national interests. In this connection, I note that, even before the assumption of such control, IKO Iran had been obliged by the Government to pay wages and benefits to its employees for a four-month period while they were on strike and the plants were closed, thus indicating the importance attached to the maintenance of employment at the expense of the financial interest of companies. In any event, the terms of the relevant Act and Decree referred to above do not indicate that the Government appointed managers and directors have any fiduciary duty to the shareholders, and the preamble of the Act indicates that the economy and industry of Iran should be managed for the following purposes:

(a) To observe the Islamic system in respect of labour rights.

(b) To disembark the economy of Iran from its affiliation to oil and to obtain independence through local production up to self-sufficiency and to expand exports.

(c) To expand work field, employment and specialization.

(d) To stop the agents of dictatorial and exploitative system.

(e) To avoid government patronage, to encourage and protect non-governmental activities and initiative of the private sector.

Property may be taken under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. See 8 Whiteman, Digest of International Law 1006-20; Christie, What Constitutes a Taking under International Law? 38 Brit. Y.B. Int'l. Law 307 (1962); Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, articles 3 and 38, reprinted in 55 Am. J. Int'l Law 545 (1961); the Lena Goldfield's Case, reprinted in Nussbaum, The Arbitration Between the Lena Goldfield's, Ltd. and the Soviet Government, 36 Cornell L.Q. 31 (1950).

These authorities indicate that, while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.

The Harvard Draft states the rule of law as follows in Article 10(3):

> 3. (a) A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.
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> (b) A 'taking of the use of property' includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

In the present case, the Claimant has received no profits from the company, not even profits accrued prior to the assumption of control by the Government, no information on the affairs of the company, and no opportunity to vote or even to attend meetings of shareholders or of the board of directors, or otherwise to participate in the management of the business. Nearly two and one half years after the appointment of directors by the Government, no steps have been taken to review the ownership status of the company (other than the negotiation of the unratified settlement agreement), and the Claimant has been given no reason to believe that it will soon, if ever, be offered the restoration of its property rights. All the Claimant can know for certain is that, if it is ever offered the opportunity to resume exercise of those rights, it will be given none of the profits, if any, made in the interim and no compensation for any reduction in value of the property caused by the

managers appointed by the Government. As was said by the International Court of Justice in the Barcelona Traction Case, the rights of the shareholder under any municipal law include "the right to any declared dividend, the right to attend and vote at any general meeting, the right to share in the residual assets of the company on liquidation" (Belgium v. Spain) (1970) I.C.J. Reports 3, 36. While I do not question Iran's right to appoint directors for IKO Iran pursuant to its laws, in the present case as it appears today, I cannot avoid the conclusion that it has thereby rendered IKO Sweden's rights of ownership so meaningless as to be the equivalent of an expropriation of those rights. While one might have been unsure of this conclusion at the time the directors were appointed, subsequent events and the passage of time have made it unavoidable.

3. Measure of Compensation

The problems of valuation of the property taken are more difficult to resolve. First is the question of the standard to be applied. The Claimant asserts the applicability of the Treaty of Amity of 15 August 1955 between Iran and the United States. The Treaty provides, in Article IV, paragraph 2, the following relevant standard:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other

> High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Although the Government of the Islamic Republic of Iran has in this and in other cases questioned whether this treaty is still in effect in light of the events of 1979 and 80, including the break in diplomatic relations between Iran and the United States, I note that the International Court of Justice held that it was still in force in 1980. See Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Reports 3, 28. Moreover, the treaty contains a provision (Article XXIII) for its termination by either Party upon one year's notice, and there has been no allegation that such notice has been given.[3] For the reasons set forth below, however, I find it unnecessary to determine that question in the present case.

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[3] The Iranian Government also took the position that the Treaty was still in force in its arguments in United States courts that it was entitled under the Treaty to immunity from attachment of its property. See, e.g., Iranian Attachment Cases, 79-Civ. - 6380 et al., Memorandum of the Government of Iran in Opposition to Confirmation of Attachments, 16ff. (S.D.N.Y., 21 April 1980).

At the Hearing the Respondent contended that the Treaty of Amity, in any event, could not be relied on in this case because the investment in question was that of a Swedish national, IKO Sweden, which could not be protected by a treaty between the United States and Iran. While the claims in this case are those of an American national, they are indirect claims through a Swedish subsidiary, and it is clear that the company that owned directly the property taken by the Respondent was the Swedish company. Thus, while the ultimate owner of that property was an American company, the immediate owner of record was not, and the question arises whether the treaty provisions protecting the property of American nationals and companies apply to that property. The parties did not brief or argue that question, and in those circumstances, I would be reluctant to decide it, particularly as the applicable rules of international law are not significantly different whether the Treaty applies or not. In either case, a taking of property must be accompanied by the prompt payment of just compensation which is effective and adequate to compensate fully for the value of the property taken. In the absence of a market to determine market value, the Tribunal must endeavor to find the value of the company as a "going concern"[4] at the time of taking. See the Chorzow Factory Case in which the

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[4]The phrase "going concern" has been defined to mean "the undertaking itself considered as an organic totality... the value of which is greater than that of its component parts...." The Government of the State of Kuwait and the American Independent Oil Company, Award of 24 March 1982 at paragraph 178(1), This value is arrived at less by appeal to theoretical constructs than by analysis of the particular circumstances of a case.

Permanent Court of International Justice defined the proper compensation in expropriation cases as "the value of the undertaking at the moment of dispossession plus interest to the day of payment." (1928) P.C.I.J., Ser. A. No. 17(1928). See also Norwegian Shipowners Case, 1 Intl. Arb. Awards 340 (1922), where the tribunal awarded "just compensation" for the taking of certain contracts; O'Connell, International Law 783 (1970).

The Claimant asserts that its investment should be valued as of a date prior to the Iranian Revolution, and it refers the Tribunal to the compensation paid by Iran for the two forced sales of shares in IKO Iran in 1976 and 1978. In the first case, compensation was paid at the rate of 2.3 times the 1000 rial par value of each share. In the second case, 1.888 times the par value was paid. For the present taking, however, the Claimant requests compensation for par value only, which for its 172,500 shares, would mean 172,500,000 rials, plus interest.

The Respondent asserts that this valuation is too high, and it points to the significant drop in compensation in only 16 months between the two forced sales and to subsequent losses suffered as a result of the strike in late 1978. The Respondent referred to audited financial statements for IKO Iran for more recent years and asserted they show a steady decline in the equity value per share

from 1166 rials per share in 1977, to 851 rials per share in 1978 to 411 rials per share in 1979 and to 212 rials per share in 1980. The Respondents conclude that approximately 21 percent of par value would be justifiable.

Financial statements of a company are not necessarily accurate indicators of the real value of the stock of that company,[5] but they do give some indication of the financial health of the company, which is relevant to the value of the stock. I am clear, however, that the relevant date for the determination of value is the date of the taking, not an earlier date prior to the revolution, as the Claimant asserts, nor a date subsequent to the taking. That Iran might experience revolution was a risk assumed by investors in Iran, as in any country; and any reduction in value of investments as a result of revolution cannot be ignored by the Tribunal. The Islamic Revolution in Iran was not a "wrong" for which foreign investors are entitled to compensation under international law. In computing compensation for expropriated property, the Tribunal must find as best it can the real value at the moment of taking, excluding only any decline in value resulting from the threat of taking or other acts attributable to the Government itself.

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[5] See generally McCosker, "Book Values in Nationalization Cases" in R. Lillich, ed., II The Valuation of Nationalized Property in International Law 36 (1973).

Evidence has been presented to the effect that the loan that was the subject of the first claim was used to construct a new, modern factory at Arak and that this placed the company in a good position when markets for cable expanded again after the Revolution. No evidence has been presented, however, concerning the development of those markets or the long-range business prospects of the company as they appeared in December 1980.

In view of the admitted losses as a result of the strike in 1978 (although some of those losses were the result of Government action) and the uncertain prospects faced by almost any industry in Iran during the period of revolutionary turmoil, I conclude that the real value of the stock of IKO Iran declined significantly between the 1978 forced sale and 22 December 1980, the date the stock was taken. How far that decline had proceeded by that date is a matter of judgment, particularly given the inadequacy of the evidence presented concerning future business prospects.

In these circumstances the Tribunal would have to face the question whether to appoint an expert to examine the question of the value of IKO Iran on 22 December 1980 or make its own best estimate on the basis of the evidence presented by the parties. Neither party in this case requested the appointment of an expert. I note that evidence concerning the probable development of cable markets

~~and the readiness of IKO Iran to serve such markets is~~ likely to be much more readily available to the Respondent than to the Claimant, and the Respondent's failure to present such evidence may properly give rise to an inference that the prospects were more positive than the financial statements presented by Respondent might indicate. See Sandifer, Evidence Before International Tribunals 147-154 (1975). See also the separate Opinion of Judge Jessup in the Barcelona Traction Case, (1970) I.C.J. Reports 3, 216.

Upon consideration of the evidence in light of the above considerations, I conclude that the real value of the shares in IKO Iran had declined by 22 December 1980 to approximately 75 percent of par value, that is to 129,375,000 rials.

The Hague
26 May 1983

George H. Aldrich